

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DIRECTV,

Plaintiff,

Civil No. 03-71001
Hon. John Feikens

v.

ALFRED HAINES,

Defendant.

_____/

OPINION AND ORDER

DirecTV brought suit alleging Defendant Alfred Haines violated the Federal Communications Act of 1934 (47 U.S.C. §605), the Electronic Communications Privacy Act (18 U.S.C. §§2510-2521), and Michigan common law by purchasing a device that allowed him to illegally modify DirecTV access cards so that he could watch satellite TV without paying for a subscription. Defendant has moved for summary judgment on all counts. In response, Plaintiff has declined to oppose the Motion for Summary Judgment and has filed a Motion for a Voluntary Dismissal.

For the reasons below, I DENY Defendant's Motion for Summary Judgment and GRANT Plaintiff's Motion for a Voluntary Dismissal.

ANALYSIS

Defendant's Motion for Summary Judgment does not state, as is required by

Local Rule 7.1(a), that the movant sought concurrence with the motion. According to Plaintiff's papers, Defendant did not seek concurrence. Therefore, I DENY the motion for summary judgment.

I now turn to the motion for a voluntary dismissal. Plaintiff moves for a voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(2), which is required when a Motion for Summary Judgment has been filed by the opposing party. See Fed. R. Civ. P. 41(a)(1). The proposed order submitted by Plaintiff specifies that the case will be dismissed with prejudice.

The decision to allow a voluntary dismissal is only improper if a defendant will suffer "plain legal prejudice" (as opposed to the mere prospect of second lawsuit) as a result. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 217 (1947), cited approvingly by Grover v. Eli Lilly Co., 33 F.3d 716, 718 (6th Cir. 1994). The Sixth Circuit has identified four factors to determine whether plain legal prejudice will result: (1) a defendant's effort and expense of preparation for trial; (2) excessive delay and lack of diligence on the part of a plaintiff in prosecuting the action, (3) insufficient explanation for the need to take a dismissal; and (4) whether a defendant has filed a motion for summary judgment. 33 F.3d 716, 718.

Here, Defendant's effort and expense of preparing the Motion for Summary Judgment could have been avoided by seeking concurrence as required by our local rules. Defendant cites the failure to respond to the Motion for Summary Judgment as the prime example of delay and lack of diligence, but Plaintiff stated in its Motion for a Voluntary Dismissal that it did not

oppose the cessation of the case with prejudice, and I think it is reasonable to delay dismissal of the case against Defendant until Defendant's deposition. I find Plaintiff's explanation for its basis in bringing the Motion for a Voluntary Dismissal sufficient. Finally, I have dismissed Defendant's Motion for Summary Judgment, so that is no longer a consideration here. Therefore, after weighing these factors, I GRANT Plaintiff's Request for a Voluntary Dismissal.

Finally, I note that Defendant has requested that Plaintiff pay his attorney's fees. Defendant represented himself until November 26, 2003. The Motion for Summary Judgment, which apparently would not have needed preparation had Defendant's attorney complied with our local rules, was the next item filed with this Court, and other than opposition to the motion for a voluntary dismissal with prejudice, nothing else has been filed by Defendant. Therefore, in my judgment, it would be inappropriate to require Plaintiff to pay Defendant's attorney fees.

CONCLUSION

I DENY Defendant's Motion for Summary Judgment, and GRANT Plaintiff's Motion for a Voluntary Dismissal with Prejudice and Without Costs or Attorney's Fees.

IT IS SO ORDERED.

John Feikens
United States District Judge

Date: _____